



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 29, 2003

Mr. Craig D. Caldwell
County Attorney
Cherokee County
P.O. Box 320
Rusk, Texas 75785

OR2003-7792

Dear Mr. Caldwell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190269.

The Cherokee County Attorney's Office (the "county attorney") received a request for all information on all cases worked on since the current county attorney took office. You have submitted to this office representative samples of different categories of the requested information.¹ You state that Exhibits 4A, 5A, and 6A, as well as records of "Judgment Nisi" civil cases filed to collect bond forfeiture, are available to the public through the County Clerk's Office. You claim that the remaining submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

You state that your office does not maintain information on the following types of records: activities of the Community Supervisions and Corrections Department, Justice of the Peace criminal cases, municipal and Justice of the Peace court appeals, juvenile criminal cases,

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

protective order applications for the Crisis Center of Anderson and Cherokee counties, occupational license applications, mental health commitment records, video recordings that have been introduced into evidence and kept by the Court Reporter at the Cherokee County Court at Law, and cases involving the abuse and neglect of children, with the exception of the trial notebook if a trial is requested. We note that a governmental body is not required to obtain information not in its possession. Open Records Decision No. 558 (1990).

Initially, we must address the county attorney's obligations under section 552.301 of the Government Code. Section 552.301 provides in part:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Public Information Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request.

The county attorney received the requestor's request for information on August 8, 2003. The county attorney requested clarification of the request on August 17, 2003, which tolled the ten business day deadline mandated under section 552.301(b). *See* Open Records Decision No. 663 (1999). The deadline resumed the day after the county attorney received clarification from the requestor, which was August 20, 2003. Therefore, by requesting a decision from this office on August 26, 2003, the county attorney acted in compliance with the deadline mandated by section 552.301(b) of the Government Code.

However, pursuant to section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. The county attorney has not submitted to this office copies or representative samples of the following information: (1) video recordings from cases awaiting trial and cases resulting in plea bargains, (2) the trial notebooks from cases involving the abuse or neglect of children, and (3) records from "Judgment Nisi" civil cases filed by the county attorney. The county attorney also failed to submit comments explaining why some of the claimed exceptions would allow information to be withheld.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982).

Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). You claim that the county attorney's trial notebook information from cases involving the abuse and neglect of children must be withheld under section 552.101 of the Government Code as information made confidential by other law. However, because you have not submitted any responsive information of this type for our review, we have no basis for finding that this information is excepted from disclosure pursuant to section 552.101. We therefore conclude that the county attorney must release the trial notebook information from cases involving the abuse and neglect of children to the requestor. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

You state that the county attorney maintains minimal records on "Judgment Nisi" civil cases filed by the office to collect bond forfeiture. You also indicate that these records are kept in the related criminal files. You have not provided this office with a copy or a representative sample of the "Judgment Nisi" records nor have you submitted comments explaining why the information should be withheld. Therefore, pursuant to section 552.302, the county attorney must release the "Judgment Nisi" records maintained in the county attorney's office. In addition, you explain that the pleadings from these proceedings are public records available for review at the county clerk's office. However, as the county attorney also maintains these pleadings, the county attorney must release the information.

You claim that video recordings from cases awaiting trial and from cases resulting in plea bargains are excepted from disclosure. However, you did not provide this office with copies of these types of video recordings, and therefore, they must be released. You submitted to this office a video recording from a case that resulted in a conviction but failed to provide arguments explaining why the information should be withheld as required by section 552.301(e). Because we find that section 552.119 demonstrates a compelling reason to withhold the information at issue, we will address the applicability of the exception to the submitted video recording. Section 552.119 of the Government Code excepts from public disclosure a photograph of a peace officer, that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that

a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. This office has determined that this provision excepts such photographs from disclosure without the need for any specific showing that release of the photograph would endanger the life or safety of the officer. Open Records Decision No. 502 (1988). It does not appear that any of the exceptions to section 552.119 apply. Furthermore, you have not informed us that any of the peace officers depicted in the videotape executed a written consent to disclosure of their images. Thus, the county attorney must withhold any portion of the submitted videotape that includes the image of a peace officer, under section 552.119, unless the county attorney obtains written consent from the peace officers for their disclosure. The remaining portion of the videotape is not protected under section 552.119 of the Government Code and must be released to the requestor. If, however, the county attorney is unable to obscure the faces of peace officers on the videotape, or otherwise remove the portions of the videotape that include the images of peace officers, then the county attorney must withhold the videotape in its entirety under section 552.119.

You claim that Exhibits 2, 3, 4B, 5B, and 6B are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code but fail to provide written comments explaining why these exceptions apply to the information at issue. Because these sections are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived by the governmental body, they do not demonstrate a compelling reason to withhold Exhibits 2, 3, 4B, 5B, and 6B from the public. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). However, because you provide comments explaining why Exhibits 2, 3, 4B, 5B, and 6B should be withheld under section 552.108, we will address the applicability of that exception to the information at issue.

Section 552.108(a) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that Exhibit 3 relates to a pending criminal investigation. Based on your representations and our review, we determine that the release of Exhibit 3 would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, the county attorney may withhold most of Exhibit 3 under section 552.108(a)(1).

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than conviction or deferred adjudication. Based on the information you provided, we understand you to assert that Exhibits 2 and 5B pertain to cases that concluded in final results other than convictions or deferred adjudications. Therefore, we agree that section 552.108(a)(2) is applicable to Exhibits 2 and 5B.

We note, however, that information normally found on the front page of an offense report is generally considered public. *See generally* Gov't Code § 552.108(c); *Houston Chronicle*, 531 S.W.2d 177; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, you must release the types of information that are considered to be front page offense report information, even if this information is not actually located on the front page of the offense report.

We also note that Exhibits 3 and 5B include arrest warrants and supporting affidavits. The 78th Legislature recently amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Act of May 31, 2003, 78th Leg., R.S., ch. 390, § 1, 2003 Tex. Sess. Law Serv. 1631 (to be codified as amendment to Crim. Proc. Code art. 15.26). This provision makes the submitted arrest warrants and supporting affidavits expressly public. The exceptions found in the Public Information Act do not, as a general rule, apply to information that is made public by other statutes. *See* Open Records Decision No. 525 (1989) (statutory predecessor). Therefore, the county attorney must release the submitted arrest warrants and supporting affidavits to the requestor.

You claim that Exhibit 4B is excepted from disclosure under subsections 552.108(a)(1) and (b)(1). However, you expressly state that Exhibit 4B relates to a case that resulted in a conviction or deferred adjudication. Therefore, subsections 552.108(a)(1) and (b)(1) do not apply to Exhibit 4B.

You claim that Exhibit 6B is excepted from disclosure under subsections 552.108(a)(2) and (b)(2). However, you expressly state that Exhibit 6B relates to a pending case. Therefore, subsections 552.108(a)(2) and (b)(2) do not apply to Exhibit 6B.

You claim that Exhibits 1, 4B, and 6B are excepted from disclosure under Open Records Decision Nos. 127 and 169. Based on your comments, we understand you to argue that the information at issue is excepted from disclosure under section 552.108. However, you argue only that the information at issue is a law enforcement record. While this is the standard set forth in the statutory predecessor to section 552.108 and analyzed in the cited open records decisions, it is not sufficient under the current section 552.108. Thus, the county attorney may not withhold Exhibits 1, 4B, and 6B pursuant to Open Records Decision Nos. 127 and 169.

However, we note that Exhibits 1, 4B, and 6B contain information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 prohibits the release of information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state, a personal identification document issued by an agency of this state, or a motor vehicle title or registration issued by an agency of this state. *See Gov't Code* § 552.130. Accordingly, the county attorney must withhold the marked motor vehicle information under section 552.130 of the Government Code.

We also note that Exhibit 6B contains medical information. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Upon review, we find that Exhibit 6B contains medical history information that is intimate or embarrassing and to which the public has no legitimate interest. Accordingly, this information, which we have marked, must be withheld under section 552.101 in conjunction with the doctrine of common-law privacy.

We also note that the marked social security numbers in Exhibits 1, 4B, and 6B may be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, you should ensure that no such information was obtained or is maintained by the county attorney pursuant to any provision of law enacted on or after October 1, 1990.

We also note that Exhibits 4B and 6B contain criminal history record information. Criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is confidential under federal law and subchapter F of chapter 411 of the Government Code. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. §20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. *See* Gov't Code §411.083(a); *see also id.* §§ 411.106(b), .082(2) (defining criminal history record information). Similarly, CHRI obtained from the DPS pursuant to statute also is confidential and may be disclosed only in very limited instances. *See id.* §411.084; *see also id.* §411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Thus, to the extent that the records at issue contain any criminal history record information obtained from the TCIC or NCIC networks, that information must be withheld under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

In summary, the county attorney may withhold Exhibits 2 and 5B under section 552.108(a)(2), with the exception of basic information, an arrest warrant, and the arrest warrant affidavit, which must be released. The county attorney may withhold Exhibit 3 under section 552.108(a)(1), with the exception of basic information, an arrest warrant, and the arrest warrant affidavit, which must be released. The county attorney must withhold the marked motor vehicle information in Exhibits 1, 4B, and 6B under section 552.130. The county attorney must withhold the marked medical information in Exhibit 6B under section 552.101. The county attorney may be required to withhold the marked social security numbers in Exhibits 1, 4B, and 6B under section 552.101. The county attorney must

withhold the criminal history record information in Exhibits 4B and 6B under section 552.101. Lastly, the county attorney must withhold the peace officers' images in the submitted video recording under section 552.119. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Amy Peterson", with a stylized flourish at the end.

Amy D. Peterson
Assistant Attorney General
Open Records Division

ADP/sdk

Ref: ID# 190269

Enc. Submitted documents

c: Mr. Wayne Herring
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(w/o enclosures)